RECENT AMERICAN DECISIONS.

Supreme Court of Missouri.

COOVER v. JOHNSON.

Where a statute provides that no condition attached to a sale of personal property shall be valid as against creditors of the vendee or subsequent purchasers from such vendee in good faith, unless such condition is evidenced by writing acknowledged and recorded, a condition that the title shall not pass until payment of the price, although unwritten and unrecorded, is valid as against creditors of the vendee who at the time of the sale, had notice of the condition.

APPEAL from Greene Circuit Court.

The facts are stated in the opinion, which was delivered by

SHERWOOD, J.—Johnson bought a pair of scales of Fairbanks & Co. The sale was a conditional one, the title being retained in the vendors until the property should be fully paid for. Johnson, after the scales were shipped to him at the town of Republic, paid the freight, receipted for them and asked and received permission of the station agent for them to remain in the freight house, at Johnson's risk. This permission was, shortly thereafter, extended on the same terms, the station agent agreeing to ship the scales to Johnson in the state of Kansas, to which state Johnson soon afterwards went, not having paid any portion of the purchase-money. Coover is a creditor of Johnson's of some years standing, a portion of the indebtedness having accrued as far back as 1878, and all of it prior to the time Johnson bought the scales. The note in suit is dated January 23d 1882, due one day after date, and matured the day Johnson made his exit. Coover kept store in Republic; was well acquainted with Johnson, who at one time had done business for him; knew of his intended departure two or three days before it occurred and, prior to suit brought, was thoroughly conversant with the terms of the contract of sale made between Fairbanks & Co. and Johnson. Coover having brought suit against Johnson and attached the scales referred to, Fairbanks & Co. interpleaded, claiming them as their property, and on trial had of their interplea, the foregoing facts were elicited.

On those facts, the court, at the instance of the interpleaders, declared the law as follows:

That if you believe from the evidence that Johnson was indebted to Coover for the debt sued on in this suit at the time he executed

the contract of purchase with Fairbanks & Co. for the scales, and that Johnson left the country and failed to carry out his contract with Fairbanks & Co., and you further believe that Coover knew the terms and conditions upon which Johnson purchased said scales, and, with that knowledge, attached the scales in controversy as the property of Johnson on said debt due from Johnson to him, Coover, then the judgment should be for the interpleaders, Fairbanks & Co.

But the court, though requested by plaintiff so to do, refused to declare the law, that: the condition in the contract of sale in evidence, that Fairbanks & Co. do not relinquish their title to the scales and its attachments in question, until said property in question is paid for, is null and void as to creditors of defendant Johnson, said contract not having been acknowledged and recorded, as in case of mortgaged personal property; and if the evidence proves that defendant, Johnson, owed the plaintiff, Coover, the note here sued on, when this suit of Coover's was commenced, and that the scale and its attachments were shipped by interpleaders from St. Louis to Republic, Mo., on the railroad, to defendant, Johnson, and at Republic delivered by the railroad company to Johnson, and plaintiff, Coover, afterward had said property attached in this suit, then interpleaders cannot recover it in this proceeding.

Other declarations of law were given, and others refused, but those just copied present and contain the kernel of this cause.

It has frequently been decided in this state that the seller of personal property might by contract with the buyer reserve the title of such property in himself, until payment was made, and that such reservation would be valid, even as against a *bona fide* purchaser: *Wangler* v. *Franklin*, 70 Mo. 659; *Robbins* v. *Phillips*, 68 Id. 100, and cases cited; *Sumner* v. *Cottey*, 71 Id. 121.

But those adjudications were made in cases which arose prior to the statutory provisions to which plaintiff's counsel have called our attention. Section 2505, R. S., 1879, contains an amendment of, or clause additional to, § 10, Gen. Stat., ch. 107, enacted in 1877, in these words: "And no sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition whatever, as against creditors of the vendee, or subsequent purchasers from such vendee in good faith, unless such condition shall be evidenced by writing, executed and acknowledged by the vendee, and recorded as now provided in cases of mortgages of personal property." Section 2507, R. S., 1879, is an original section, enacted

for the first time in 1877, and contains similar prohibitory provisions, declaring that "Such condition, in regard to the title so remaining, shall be void as to all subsequent purchasers in good faith and creditors, unless," etc. It cannot be doubted that the legislature, by these sections, intended to make a radical change in the law relating to conditional sales of personal property, and to prevent secret and unrecorded transactions and contracts of sale from being used to the detriment of unsuspecting creditors of, or purchasers from, the vendee of personal property apparently the owner thereof. This I regard as the whole object, purpose and scope of the law, as it now stands.

Here, so far as the attaching creditor was concerned, there was in fact no secret lien, no hidden trust, no false appearance, no concealed ownership; nothing, in short to induce him to alter his condition, incur needless litigation or expense, or which could in any manner operate to his prejudice.

There is a wide divergence in judicial opinions as to the legal effect which should be given to conditional sales of chattels, when by the terms of the contract of sale, there is a reservation of title in the vendor; but, except where controlled by statutory regulation, all the authorities concur in holding the condition binding as between the parties. And even those authorities which uncontrolled by statute, hold that title will pass to a *bona fide* purchaser, deny this result, where the purchaser has notice: *Stadtfield* v. *Huntsman*, 24 Alb. L. J., 185; 1 Benj. Sales, § 425.

In Illinois, by statutory provision, all such agreements are treated as chattel mortgages, and void as to third persons if not recorded in like manner as such instruments. The statute of that state makes no exception in favor of any person whatsoever. Notwithstanding this, in a somewhat recent case, in that state, special stress was laid on the fact that the creditor was *bona fide*, having no reason but to rely on the apparent ownership of the property by his debtor; and it was there ruled, that in this regard, a purchaser without notice and a *bona fide* creditor stand on the same footing of equal protection: *Van Duzar* v. *Allen*, 90 Ill. 499. In respect to a similar statute in our own state: § 2503, R. S., 1879, in relation to mortgages of personal property, and requiring them to be recorded in order to their validity against third persons, no exception having been made in favor of any one, it has been several times ruled that, even if a purchaser had *actual knowledge* of the mortgage, he would nevertheless

obtain a good title: *Byrson* v. *Penix*, 18 Mo., 13; *Bevans* v. *Bolton*, 31 Id. 437. And, in regard to § 2500, R. S., 1879, touching loans of personal property, and making their registry requisite, so as to be valid against creditors and purchasers, but containing no exception, a like ruling has been made: *Cook* v. *Clippard*, 12 Mo. 379. If it be presumed that the legislature was not ignorant of the rulings in the cases just cited, and taking this for granted, it must be apparent, that when they inserted the words "as against creditors of the vendee or subsequent purchasers from such vendee in good faith," in § 2505, and similar words in § 2507, their design was to prevent actual knowledge in a purchaser or creditor from being held in less esteem than constructive notice, as imparted by the record. The sections in question are somewhat awkwardly worded, but I am persuaded that the expression *bona fide*, applies as well to creditors as to subsequent purchasers. Indeed, no reason can be discovered why the one class should receive greater legislative favors than the other. Such statutes as the sections under discussion have, of late years, been enacted in many of the states, as for instance in Vermont, where the statute provides that "No lien reserved on property sold conditionally, and passing into the hands of the conditional purchaser, shall be valid against attaching creditors or subsequent purchasers without notice, unless," etc. And upon this statute it was ruled, that as the contract of sale was not placed on record, the property sold "was open to attachment as the property of the conditional vendee, unless the plaintiff could show that the attaching creditor had notice of the conditional sale." *Whitcomb* v. *Woodworth*, 54 Vt. 544. A decision of like effect on similar statutory provisions has been made in Iowa: *Singer S. M. Co.* v. *Holcomb*, 40 Iowa 33.

The language of the statutes just cited, "attaching creditors or subsequent purchasers without notice," is not essentially different in point of legal effect from the phraseology employed in our own law. "Without notice," and "in good faith," are equivalent terms: *Lee* v. *Bowman*, 55 Mo. 400.

Holding these views, the judgment should be affirmed.

The Supreme Court of Missouri has often held, that in the absence of controlling statutory regulations, personal property may be sold on condition, and while the condition remains unperformed the right of property remains in the vendor: *Sumner* v. *Cottey*, 71 Mo. 121; *Ridgeway* v. *Kennedy*, 52 Id 24; *Little* v. *Page*, 44 Id. 412; *Parmlee* v. *Catherwood*, 36 Id. 479; *Griffin* v. *Pugh*, 44 Id. 326; *Diver* v. *Denney*, 6 Mo. App. 578; *Willard* v. *Sumner*, 7 Id. 577.

And the same court holds that the vendor may assert his right to the property, even against a *bona fide* purchaser, unless he (the vendor) has been guilty of laches: *Robbins* v. *Phillips*, 68 Mo. 100, 101; *Wangler* v. *Franklin*, 70 Id. 660.

Yet it is to be observed that the decisions were made prior to the enactment of the statute, construed in the principal case.

This same rule has also been adopted in many other states: see 1 Benj. on Sales (4th Am. ed.) § 437, *et seq.*, where the cases are collected.

But that the vendor may have control over the property, in such cases, it is necessary before he parts with possession to expressly stipulate that the title shall remain in him, until all the conditions shall have been complied with by the vendee; as in a contract of sale of goods, which is to be complete after examination and approval by the purchaser; *Blood* v. *Palmer*, 11 Me. 420; *Crocker* v. *Gullifer*, 44 Mo. 493; *Morse* v. *Stone*, 5 Barb. (N. Y.) 516.

Where the manifest intention of the parties is, that the vendor retain the title, no property passes until all conditions are performed. Thus in *Keeler* v. *Field*, 1 Paige Ch. 312, a merchant contracted for goods, the price to be secured by his notes, endorsed by B. and C., and the goods in the meantime were forwarded to his residence. The notes were never delivered. The goods were afterwards assigned to B. and C. The court held that the title never passed to the vendee, as the condition upon which the sale was made had not been performed, and that B. and C. could not hold them against the vendor. In *Haggerty* v. *Palmer*, 6 Johns. Ch. 437, goods were sold at auction in the city of New York, to be paid for in *approved endorsed* notes at four and six months. The goods were delivered to the vendee, and he afterwards assigned them to a third party. The court held that the delivery of the goods was conditional, and the vendee was a trustee for them until the notes were delivered, and that the assignment was fraudulent.

In *Crawford* v. *Smith*, 7 Dana (Ky.) 59, plaintiff made an agreement to sell goods then in his store to defendants. The next day, the parties commenced invoicing the goods to ascertain the amount to be paid by the defendant for them. During the night, after a considerable portion of the goods had been invoiced, a thief broke into the store and stole sundry articles of the aggregate value of $300, some of which, of the value of $40 had been invoiced. Crawford brought suit against Smith for the value of the goods. No recovery was allowed because he had not parted with the possession of the goods: see also *Ward* v. *Shaw*, 7 Wend. (N. Y.) 404.

The vendor may estop himself from claiming title, in contracts of this nature as against a *bona fide* purchaser from the vendee in possession, as where he gives vendee evidence of title, or express or implied authority to sell. This principle appears quite well settled, but in its application the cases are at variance: 1 Benj. on Sales (4th Am. ed.) § 448, *et seq.*

In dealing with contracts of this nature to avoid confusion an important distinction is to be noted between an option to purchase if the vendee should like the article, and an option to return it, if he should not like it. In the first, the title will not pass until the option is determined; in the second, the title passes at once. One is an agreement to sell, and the other is an absolute sale. *Hunt* v. *Wyman*, 100 Mass. 198, clearly illustrates this distinction.

In the transfer of title to personal property upon a cash sale, only two things are essential, namely, payment by the vendee, and actual or constructive delivery by the vendor. The first may be waived, and is waived by vendor by delivery, for confidence is reposed, credit is given and property passes: *Chapman* v. *Lathrop*, 6 Cowen 110; *Harris* v.

Smith, 3 S. & R. 20, 24; 2 Kent's Com. 391.

It is also a familiar principle that where personal property passes out of the hands of the vendor, he thereby loses all right of lien. The only exception is in cases of *stoppage in transitu*, and that can be exercised, only when the vendee is insolvent, and before the goods get into his possession: Benj. on Sales, § 828, and notes.

The proposition is also well settled that the delivery of an article at a fixed price, to be paid for on approval, at the option of the *receiver*, constitutes a sale, and is treated in all respects as the property of the vendee.

We shall cite but a few cases to illustrate this rule. In *Crocker* v. *Gullifer*, 44 Me. 493, the defendant took horses from the plaintiff, and agreed to pay for or return the same, but it was specifically agreed that the title should remain in the plaintiff (vendor). This was held to be a bailment, because the title had never passed out of the plaintiff. The court said: "The general proposition that the delivery of an article at a fixed price, to be paid for or returned, constitutes a sale, is not questioned. When the option is with the party *receiving*, to pay for or return the goods received, the uniform current of authority is, that such alternate agreement is a sale." In *Holbrook* v. *Armstrong*, 1 Fair. (Me.) 31, there was a parol agreement to pay for the property in dispute, or return the same at the end of two years. This was held to amount to a sale. In *Dearborne* v. *Turner*, 16 Me. 17, it was held that Mason, who received the property, "having to return or pay, the property passed to him, and he was at liberty to sell." In *Baswell* v. *Bicknall*, 17 Me. 344, the party receiving the article in dispute, verbally agreed to pay a certain price therefor, or return the same in a given time. "The property," remarked WESTON, C. J., "in the thing delivered passes, and the remedy of the former owner vests in contract. It is the option conceded to the party *receiving*, which produces this effect." In *Perkins* v. *Douglass*, 20 Me. 317, the written promise was to return the chattel or pay therefor. SHEPLEY, J., said: "Such a contract does not reserve to the seller a right in the property for the security of the purchase-money." In *Southwick* v. *Smith*, 29 Me. 228, notes were given for hides, and a further agreement to return the leather made from the same, if the notes should not be paid at maturity, and the proceeds to be applied to their payment. This was held to be a sale. The following additional cases also well illustrate the rule under consideration: *Smith* v. *Clark*, 21 Wend. (N. Y.) 83; *Jenkins* v. *Eichelberger*, 4 Watts (Pa.) 121; *Prichett* v. *Cook*, 62 Penn. St. 193; *Walker* v. Blake, 37 Me. 373, 375; *Beffum* v. *Merry*, 3 Mason 478; *Ray* v. *Thompson*, 12 Cush. 281; *Hurd* v. *West*, 7 Cowen 752; *Moss* v. *Sweet*, 16 Ad. & El. 493; *Jameson* v. *Gregory*, 4 Metc. (Ky.) 363; *Chamberlain* v. *Smith*, 44 Penn. St. 431. The sale is not "complete while anything remains to be done to determine its quantity, if the price depends on this *unless this is to be done by the buyer alone*," per COLE, J., in *McClung* v. Kelley, 21 Iowa 511.

Conditional sales like that in the principal case, where the title of the property is to be retained in the vendor until the property is fully paid for, are of frequent occurrence, and are held binding as between the parties to the contract, in the absence of controlling statutory regulations, or where the rights of innocent third parties intervene; *Fosdick* v. *Schall*, 99 U. S. 235, 250; 1 Benj. on Sales (4th Am. ed.) § 425, *et seq.*, and notes, where the result of the cases are given.

Many states of the Union have enacted similar statutes to that passed upon in the principal case, and they are given full force by the courts. The avowed purpose of such restrictive legislation is to protect the interests of innocent third

persons, who contract with reference to such personal property, without notice of the conditions upon which it is held by the vendee. These statutes are to the effect that contracts for conditional sales, where possession is delivered to the vendee, and the title is reserved to the seller to secure the price, shall be void as to the vendee's creditors and buyers without notice, unless such contracts are in writing, and filed or recorded in some public office specified by the statute. The Iowa statute provides that "no sale, contract, or lease, wherein the transfer or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee, or lessee, in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded, the same as chattel mortgages:" McClain's Annotated Statute of Iowa (1880), § 1922, p. 542; Miller's Annotated Statute, § 1922.

This section has been passed upon several times by the Iowa Supreme Court: *Pash* v. *Weston*, 52 Iowa 676; *Warner* v. *Jameson*, 52 Id. 72; *Singer Sewing Machine Co.* v. *Holcomb*, 40 Id. 33; *Budlong* v. *Cottrell*, 64 Id. 234.

In *Pash* v. *Weston*, *supra*, in construing the section, the court said: The meaning of this section doubtless is, that where a sale, etc., is made of personal property, and the transfer of title is made to depend upon any condition, the condition shall not be valid against creditors, etc., unless the terms of the sale be expressed in writing, etc. In other words creditors, etc., without actual notice of the condition, may claim that the title passed to the vendee, unless the vendor gives constructive notice of the condition in the manner provided. The sale, we think, is to be regarded invalid in no sense except as a conditional sale, but it is to be regarded as such in the absence of notice, actual or constructive. So far we presume that there is no question."

Substantially the same statutes are in force in Illinois (*Van Duzor* v. *Allen*, 90 Ill. 499); Maine (*Boynton* v. *Libby*, 62 Me. 253); Minnesota (*McClelland* v. *Nichols*, 24 Minn. 176); Nebraska, Texas, Vermont (*Whitcomb* v. *Woodworth*, 54 Vt. 544; *Bugbee* v. *Stevens*, 53 Id. 389); Virginia, West Virginia, and Wisconsin (*Benn* v. *Valley Lumber Co.*, 51 Wis. 376). For additional authority, see 1 Benj. on Sales, § 461; *Heryford* v. *Davis*, 102 U. S. 235; note of Lucius S. Landreth, Esq., in 21 Am. Law. Reg. (N. S.) 224, 225; also *Sumner* v. *Woods*, 67 Ala. 139; s. c. 42 Am. Rep. 104, with note, p. 105; and *Fairbanks* v. *Eureka Co.*, 67 Ala. 109, for a very elaborate discussion of the question under consideration, in the absence of statutory regulations. The conclusion arrived at in these cases, is that a purchaser of personal property from one in possession under a sale upon an unfulfilled condition gets only the conditional title of his vendor, although he buys in good faith and in ignorance of the condition.

Bridget v. *Cornish*, 1 Mackey (D. C.) 29, is an interesting case. Here there was a conditional sale of a buggy and harness. By the terms of the written agreement, A. "hired" of B., the property for a term of three months from date, for the sum of $25 per month, together with a cash payment of $50, making in all $125, and A. was given the privilege of purchasing at the end of the time, by paying an additional $125. The court held that the equity of the property passed with the possession to A., and that a subsequent purchaser *bona fide* from A., obtained good title, as no lien of B.'s had been recorded as required by the statute. The court said: "The presumption is, that the possessor of personal property is its owner, and the world have a right to deal with him as such. They deal at their peril, it is true, but where the title has been qualifiedly passed with the possession, and the lien upon it is not reserved according to the

conditions of the statute, which requires a written incumbrance and a record of it, the vendor of the property parts with the possession at his peril; and if an equity in the property by purchase concurring with the possession, is found with a vendor who sells in a public market to a *bona fide* purchaser, the sale carries title with it."

B. E. BLACK.

San Francisco, Cal.

Supreme Court of Indiana.

HOCKETT *v.* STATE.

The fact that an article is manufactured under a patent granted by the United States, does not prevent a state, in the exercise of its police powers, from regulating its use.

A telephone company is a common carrier, in the same sense as a telegraph company. Its instruments and appliances are devoted to public use, and are subject to legislative control; so that the legislature of a state may prescribe the maximum charges for instruments and service.

Such regulation of property devoted to public use is not the taking of private property for public use, nor is it in any way an interference with the constitutional rights of a citizen in private property.

The word "telephone," as used in the act of April 13th 1885, designates and refers to an entire system, or apparatus composed of all the usual and necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument.

Where a word has become a "term of art," evidence is admissible to explain its proper meaning.

Where a legislature has power and authority to enact a law, the courts cannot sit in judgment on its justice or expediency.

APPEAL from Marion Criminal Court.

McDonald, Butler & Mason, Baker, Hord & Hendricks, and *Williams & Thompson*, for appellant.

Harris & Calkins, and *Byfield & Howard*, for appellee.

The opinion of the court was delivered by

NIBLACK, C. J.—On the thirteenth day of April 1885, the legislature of this state passed an act entitled "An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation;" the tenor of which is as follows:

"Section 1. Be it enacted by the General Assembly of the state of Indiana, that no individual, company, or corporation, now or hereafter owning, controlling or operating any telephone line, in operation in this state, shall be allowed to charge, collect, or receive as